

Call for input by the Working Group on Business and Human Rights

The role of national human rights institutions in facilitating access to effective remedy for business-related human rights abuses

(June 2019)

The Portuguese Ombudsman institution, in its capacity of national human rights institution fully in line with the Paris Principles and accredited with “A” status since 1999, hereby replies to the call for input by the Working Group on Business and Human Rights on the role of national human rights institutions in facilitating access to effective remedy for business-related human rights abuses. The current mandate holder is Maria Lúcia Amaral.

The role and mandate of NHRIs in facilitating access to effective remedy for business-related human rights abuses.

Does your NHRI have an explicit or implicit mandate to handle complaints concerning alleged business-related human rights abuses? If yes, what methods (e.g. mediation or conciliation) can be used to facilitate access to remedy for human rights abuses?

The Portuguese Constitution (Article 23) and the Portuguese Ombudsman Statute (Article 1) establish that the main function of the Portuguese Ombudsman is to defend and to promote the rights, freedoms and guarantees and legitimate interests of citizens, ensuring that public authorities act fairly and in compliance with the law.

Legal provisions explicitly grant the Ombudsman with protection and promotional mandate, which is reflected in the set of competences and powers that the law confers to the officeholder.

The Portuguese Ombudsman has also competence to act in regard to relationships between private entities, but only if they entail a special relationship of power from one over the other and the aim of the intervention is to protect fundamental rights, freedoms and guarantees.

This means that the Portuguese Ombudsman has powers to intervene in cases of human rights abuses by private companies and may use all methods at his/her disposition, including informal means such as mediation, conciliation and friendly settlement approaches.

The Portuguese Ombudsman may act on matters falling within his/her competence on the basis of complaints submitted by any person or group of persons (whether natural or legal persons), as well as on his/her own initiative.

What types of remedies can your NHRI offer to individuals or communities affected by business-related human rights abuses? Do you consider those remedies to be effective?

The Portuguese Ombudsman is vested with a wide set of powers that include the possibility to issue legislative or administrative recommendations, to point out shortcomings in legal framework or administrative practices.

The Ombudsman has also powers to address suggestions and/or remarks to the entities under his/her competence and is entitled to use more informal approaches deemed appropriate to obtain swift and effective solutions.

In case of business related human rights abuse, our NHRI may resort to any of the above powers, and may issue recommendations to the entities responsible for eventual abuses so that they refrain from certain conducts or provide for actions.

Although the Portuguese Ombudsman has no binding powers, a characteristic of Ombudsman type institutions, it was established in 1976 and enjoys a well established reputation of integrity and independence, so that the recommendations and suggestions/remarks issued are usually accepted.

Does your NHRI have a mandate to investigate, conduct inquiry and adjudicate individual cases of alleged human rights abuses by businesses? If yes, please provide relevant statistics in relation to complaints received and adjudicated.

The Portuguese Ombudsman has a mandate to investigate complaints and to conduct inquiries of alleged human rights abuses by businesses. That includes both State owned enterprises and business enterprises. The Portuguese Ombudsman has also public authority powers.

The fulfilment of the Portuguese Ombudsman mandate to protect and promote human rights includes powers:

- to undertake the investigations and enquiries deemed necessary or convenient to collect and produce evidence using all reasonable means, provided that such means do not collide with the rights and legitimate interests of citizens;



- to make, with or without prior notice, inspection visits to any entities under his/her control, hearing their bodies and officials and requesting any data deemed necessary;
- to request actions within the investigation process directly to Public Prosecution officials or any other public entities;
- to request statements or information from any person whenever they are necessary for establishing the facts.

The Portuguese Ombudsman may act on matters falling within his/her competence on the basis of complaints submitted by any person or group of persons as well as on his/her own initiative.

There are no specific statistics on the cases related to business and human rights that have been investigated by the Portuguese Ombudsman.

Does your NHRI give any special attention to facilitate access to your complaint mechanisms by vulnerable or marginalised groups? If yes, what measures have been taken in this regard?

The Portuguese Ombudsman is mandated to promote and protect all human rights, with particular attention to the most vulnerable citizens on account of their age or ethnicity, gender or disability (see Article 4 §2 of the Statute).

In order to facilitate access by individuals, groups and communities who live in more remote areas of the country, the Portuguese Ombudsman has a Cooperation Protocol with the National Association of Portuguese Municipal Councils, established in 2010 in order to promote the diffusion of information on people's rights and on the Ombudsman's mission, competences and activity. Under this Protocol, Municipal Councils guarantee (i) the free use of computers to the people who wish to register a complaint to the Ombudsman via website, (ii) to assist persons submitting complaints and (iii) to disseminate information explaining the mission and duties of the Ombudsman.

The Portuguese Ombudsman also established a Cooperation Protocol with the High Commissioner for Migrations, through which migrants are informed of their rights and given information about the mission and competences of the Ombudsman and how to file a complaint. At the of the National Centres for Immigrants Support, migrants have access to the Portuguese Ombudsman website and are assisted in case they wish to file a complaint.

The issues concerning the rights of children, the rights of elderly persons and the rights of persons with disabilities are addressed by a specialized structure – the Children, Elderly Persons and Persons with Disabilities Unit, identified by the acronym N-CID - which has been in operation since 2009. The N-CID is responsible for the operation of three specialized and toll-free telephone

services (the Children's Hotline, the Elderly Citizens' Hotline and the Persons' with Disabilities Hotline).

What gender-sensitive and gender-responsive measures your NHRI take in dealing with cases of alleged business-related human rights abuses?

A pedagogic approach is particularly important when dealing with complaints that challenge the legitimacy of gender specific measures in force and the Portuguese Ombudsman has always emphasized this dimension.

Namely, we have suggested the conducting of trainings and the amendment of the ethical code of the Police Force in order to better address the social challenges posed by the protection of the most vulnerable, which necessarily includes a gender perspective.

What other measures does your NHRI undertake to facilitate access to remedy indirectly for business-related human rights abuses (e.g. raising awareness about rights and remedial mechanisms, providing legal assistance, building capacity of communities or businesses, assessing effectiveness of other grievance mechanisms, and recommending reform of the national legal system to strengthen access to remedy)?

According to the Statute, whenever a judicial or administrative remedy especially provided by law is available, the Ombudsman may refer the complainant to the competent authority (Article 31 §1).

Some complaints to the Portuguese Ombudsman concern the provision of essential services that may impact on the right to adequate housing and standard of living and on the right to water and sanitation. Since, in Portugal, disputes regarding essential public services benefit from the legal regime of necessary arbitration, some complainants are referred to this legal mechanism, that is free of charge or available on payment of a reduced fee. Other cases are referred to the Water and Waste Services Regulatory Authority or to the Energy Services Regulatory Authority since these entities are competent to assess complaints submitted by the public.

In any case, the Portuguese Ombudsman shall always inform the complainant of the judicial remedies within his/her reach (Article 31 §2).

Our website is also being renovated in order to enhance knowledge on the rights and remedies mechanisms available as well as our competences.

How does your NHRI collaborate with other judicial or non-judicial remedial mechanisms (e.g. courts, labour tribunals, National Contact Points, and

operational level grievance mechanisms) in dealing with complaints concerning business-related human rights abuses?

Kindly see the previous answer.

Can your NHRI deal with alleged business-related human rights abuses with a transnational or cross-border dimension (e.g. through informal visits and exchange of information or a cooperation arrangement with counterparts in other States)?

The Portuguese Ombudsman can only intervene in relation to the action of Portuguese national entities.

Nevertheless the Portuguese Ombudsman is part of several international networks of Ombudsman and NHRI and, if appropriate, may ask for their collaboration or even refer cases to them (i.e. the European Network of Ombudsman, the FIO Iberoamerican Federation of Ombudsman).

Where a National Action Plan on Business and Human Rights exists (or is under development), does it provide for a role for NHRIs in relation to access to remedy in case of business-related human rights abuses?

At the present date there is no National Action Plan on Business and Human Rights in Portugal.

A National Plan on Corporate Social Responsibility is being finalised by the Portuguese Government (Secretary of State for Consumers Protection) through the General Directorate for Economic Activities. According to information available, the plan shall be divided into five focus areas: social, economic, environmental, cultural and business & human rights. It aims to raise the awareness of businesses in respect of adopting a socially responsible management strategy as a way of leveraging their competitiveness and sustainability, while also making an increasingly positive contribution to society. The conclusion of such plan is expected until the end of 2019.

The Portuguese Ombudsman has not participated in the elaboration of the above mentioned plan and so far has no knowledge of its contents.

However, it should be noted that the Portuguese Ombudsman is closely following this matter and requested a meeting with the Secretary of State for Consumers Protection in order to stress out the importance of concluding the National Plan. This meeting was held on April 2019 and the Ombudsman was represented by the Deputy Ombudsman Teresa Anjinho.

Challenges and limitations faced by NHRIs in facilitating access to effective remedy for business-related human rights abuses

What are the most critical challenges and limitations (e.g., legal, practical, or financial) that your NHRI has experienced in facilitating access to effective remedy in business-related human rights abuses? How could these challenges or limitations be overcome?

The challenges are linked to the specific nature of the institution, namely the circumstance that the Ombudsman has an informal power that influences the decisions and actions of the entities under his/her competence through the lens of justice and legality, exercising a persuasion mandate.

Since the Portuguese Ombudsman does not have binding powers and the recommendations/decisions are not enforceable, he/she counts on the response of the entities to which information and data are requested.

Nevertheless, and in order to prevent cases of lack of collaboration, the Constitution (Article 23 §4) and the Statute (Articles 29 and 30) establish the duty to cooperate with the Ombudsman. Unjustified non-compliance with the duty to cooperate established shall constitute a crime of disobedience, notwithstanding the applicable disciplinary proceedings.

How has your NHRI dealt with complaints involving multiple victims?

The most frequent complaints that have an impact on groups of people or communities are related to pollution, namely pollution of water resources, air pollution and noise pollution, potentially affecting the human rights to water, to health and to an adequate standard of living.

In these cases, the action of the Ombudsman is firstly focused in obtaining all relevant information related to the situation at stake, in particular as to its causes and impacts. Secondly, the Ombudsman assesses the response of the competent public entities and the results of the monitoring actions that have been carried out or that were requested.

The Ombudsman intervention is aimed at ensuring that (i) public entities determine the adoption of preventive measures, whenever justified, (ii) the allegedly polluting activities are carried out in compliance with all legal and environmental parameters, (iii) the rights of complainants and of all affected individuals are respected and (iv) follow-up and monitoring actions are undertaken.

What has been the experience of your NHRI in dealing with complaints concerning parent and subsidiary companies or the supply chain of a company?

There have not been complaints of this nature presented to the Portuguese Ombudsman.

Good practices, innovations and recommendations to strengthen the role of NHRIs in facilitating access to effective remedy for business-related human rights abuses

The Portuguese Ombudsman is currently considering how to improve its institutional responses to issues related to business and human rights.

Our institution is especially committed to reiterating that responsible operation of business and effective regulation can contribute to promoting respect, protection and fulfilment of human rights and that it is crucial that States create a legal framework to appropriately and effectively regulate the activities of business corporations, in accordance with the United Nations Guiding Principles on Business and Human Rights and with the Recommendation CM/Rec (2016).

At the international level, the Portuguese Ombudsman is actively involved in the issue of business and human rights. In October 2018, the Deputy-Ombudsman Teresa Anjinho was elected by the General Assembly of ENNHRI to represent Europe in the GANHRI Working Group on Business and Human Rights.

We are also represented in the FIO Iberoamerican Federation of Ombudsman Working Group on Business and Human Rights and, among other initiatives, contributed to the 2018 Guide “Recommendations for incorporating a business and human rights approach in the activity of Ombudsman in mining contexts”¹.

Furthermore, the Portuguese Ombudsman cooperates with the United Nations Human Rights Bodies, answering questionnaires and submitting shadow reports to the Universal Periodic Review, the Treaty Bodies, the Special Rapporteurs and the Working Groups.

¹ <https://www.profigo.info/publications>